

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

IN RE:

BANK OF AMERICA  
WAGE AND HOUR EMPLOYMENT  
PRACTICES LITIGATION

(This document relates to all cases)

MDL DOCKET NO. 2138

Case No. 10-md-2138-JWL

**PROTECTIVE ORDER**

Plaintiffs and Defendants Bank of America, N.A. and Bank of America Corporation, hereby jointly stipulate and request that the Court enter a protective order pursuant to Federal Rule of Civil Procedure 26(c), to ensure and maintain the confidentiality of certain personnel and training records and materials, as well as other records and documents, Plaintiffs or Defendants may produce in response to pretrial discovery requests in this MDL. Plaintiffs allege that they were denied proper compensation under the Fair Labor Standards Act and various state wage and hour laws. It is anticipated that, in discovery, Plaintiffs will seek sensitive confidential information related to Defendants' employees and business practices. Accordingly, the Court finds good cause to enter the protective order and requires the parties to abide by the following terms:

1. Pursuant to Federal Rule of Civil Procedure 26(c), the parties may designate documents, information and/or materials as "Confidential." All documents, information or materials designated as "Confidential" shall be entitled to protection as provided for in this Order. Documents, information or materials that may be designated as "Confidential" include: a) sensitive personnel-related information, including performance evaluations, disability or medical files, social security numbers, wage information, personnel files or other employment-related materials

concerning Defendants' present and former employees, including Plaintiffs; and b) proprietary, confidential, commercially valuable and/or competitively sensitive information concerning Defendants that is produced or otherwise conveyed during this litigation to Plaintiffs, including sensitive management and employee training materials, payroll information, and management policies, handbooks and/or manuals not shared with hourly employees or the general public. If any party determines that any of its answers to written discovery requests, production, and/or deposition testimony, or those of a third party, contains "Confidential" information, the specific item or passage of testimony shall be marked "Confidential" and shall not be disclosed to any third parties except as provided in this Order and Agreement. For any documents or materials produced prior to the entry of this Order, the parties may designate those materials as "Confidential" by notifying the other party of the Bates range numbers of the documents to be so designated pursuant to this Order.

2. It is expressly understood that this Order and Agreement shall not apply to any formerly "Confidential" information that Defendants have made known or make known to or available for use to the public and/or the industry in which Defendants are engaged.

3. Plaintiffs and Defendants have the right to designate as "Confidential" materials produced, disclosed, or possessed by each other. If a party does not agree with the designation, it shall nevertheless treat the documents or information as "Confidential" until such time as this Court determines that such materials are not entitled to be treated as "Confidential." In the event that any party disagrees with the designation of any item as "Confidential" and subject to this Protective Order, that party shall send a written notice to opposing counsel specifying the items in question and specifying the basis for the objection within 30 days of the receipt of the designation. In the event that the parties cannot reach an agreement concerning the confidentiality of the items in question,

the party proposing confidentiality and designating the items as confidential shall, within 30 days after the receipt of the objection to the designation, file a motion with the Court requesting a determination as to whether the item is properly subject to this Protective Order. In the event a party files a motion, the burden of proof and persuasion shall be on the party proposing confidentiality.

With respect to deposition testimony, the designation of confidentiality shall be made on the record at the time of the deposition, at which time the testimony shall be subject to the full protection of this Order. In the case of testimony not so designated during the course of a deposition, counsel may, within five (5) days of receipt of the deposition transcript, notify the parties that the deposition testimony contains confidential material, in which case the designated testimony shall be subject to the full protections of this Order. Objections to such designation shall be addressed pursuant to the procedures in this paragraph.

4. If timely corrected, an inadvertent failure to designate materials designated as "Confidential" does not, standing alone, waive the disclosing party's right to secure protection under this Order for such material. If material is appropriately designated as "Confidential" after the material was initially produced, the non-disclosing party, on timely notification of the designation, must make reasonable efforts to ensure that the material is treated in accordance with the provisions of this Order.

If a party learns that, by inadvertence or otherwise, it has disclosed materials or information designated as "Confidential" by the other party to any person or under any circumstance not authorized under this Order, that party must immediately (a) notify in writing the opposing party of the unauthorized disclosure, (b) use its best efforts to retrieve all copies of the materials or information designated as "Confidential," (c) inform the person or persons to whom unauthorized

disclosure was made of the terms of this Order, and (d) request such person or persons to execute the "Statement of Confidentiality" that is attached hereto as Exhibit A.

5. All documents, information, and materials designated as "Confidential" shall be maintained as "Confidential" and shall not be used except in connection with the litigation of this matter regardless of whether the litigation occurs in this MDL or the underlying transferor courts. Documents, testimony, information and materials designated as "Confidential" may be disclosed only to the Court, Court personnel, jury members, counsel of record for the parties (including all attorneys and support staff of the law firms), Defendants' in-house counsel, Defendants' employees, Named Plaintiffs, opt-in Plaintiffs, or pursuant to the provisions of paragraphs 6 and 7, below. The parties shall not otherwise disclose any "Confidential" documents, testimony, information, or materials except pursuant to a written agreement by counsel, or absent such agreement, pursuant to an Order of this Court upon Motion duly made. Nothing in this Protective Order shall limit any party or person in the use of its own documents, information or things for any purpose. Nothing in this Order shall preclude the receiving party from using "Confidential" data to make reports, taking screen prints, or creating simulations, etc., but such work product shall itself be deemed "Confidential."

6. If a party wishes to use any materials designated as "Confidential" in any affidavits, briefs, memorandum of law, or other papers filed in this Court in this litigation, such papers or transcript will be filed under seal only upon a court order granting a separate, specific motion for leave to file documents under seal pursuant to D. Kan. R. 5.4.6 and Section II J. of the Court's Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in the United States District Court for the District of Kansas.

7. A party may disclose documents, information, and materials designated as "Confidential" by the opposing party to experts, consultants, corporate representatives assisting in defense of plaintiffs' claims, deposition witnesses, and/or other witnesses (including individual parties) who have a need to review the material in connection with their potential and actual testimony in this case and who agree to be bound by this Order. Any third parties provided access to information, documents, or materials designated as "Confidential" shall not disclose that information except in deposition, an expert report or court testimony.

Any person, other than the Court, counsel, or the parties as specified in paragraph 5 who obtains access to "Confidential" materials pursuant to this Order shall, consistent with the above provisions and prior to the receipt of such "Confidential" materials, sign a copy of Exhibit A, "Statement of Confidentiality," which is attached hereto, agreeing to abide by the terms of this Order and Agreement and agreeing to submit to the jurisdiction of this Court for enforcement of the terms of this Order. Any signed Statement of Confidentiality shall be forwarded to opposing counsel upon reasonable request by counsel following the final disposition of this matter.

8. Nothing in this Order and Agreement shall prohibit the parties from using "Confidential" documents and information in depositions conducted in this litigation provided that the deponent is a person identified in paragraph 5 above, or the deponent agrees to be bound by this Order and Agreement. In the event that a deponent declines a request by either party to execute a Statement of Confidentiality (Exhibit A) agreeing to be bound by the terms and provisions of this Order and Agreement, no "Confidential" information, documents or other materials shall be disclosed to the deponent unless and until the party conducting the deposition has had a reasonable opportunity to request the Court either to compel the deponent to agree to this Protective Order or

to provide some other form of relief.

9. This Order and Agreement does not affect the right of Defendants to use "Confidential" documents or information in the ordinary course of business, so long as they are specifically treated as confidential.

10. The inadvertent production or disclosure of any document or thing otherwise protected by the attorney-client privilege or work product immunity shall not operate as a waiver of any such privilege or immunity. Upon demand of the producing party, all copies of any inadvertently produced document shall be returned forthwith, and such documents shall not be introduced into evidence, or subject to production, in this or any other proceeding without the consent of the producing party. If the inadvertently produced document or thing was disclosed by the receiving party before notification of the inadvertent disclosure, the party receiving the materials or information must take reasonable steps to return or destroy the inadvertently produced document or thing, as well as any document, or any portion thereof that contains or is otherwise derived from inadvertently produced information, and such documents shall not be introduced into evidence, or subject to production, in this or any other proceeding without the consent of the producing party.

a. If the party who received the inadvertently disclosed materials or information wishes to contest that any such document or thing was inadvertently produced or is protected by the attorney-client privilege or by work-product immunity, that party shall so notify the party who made the inadvertent disclosure in writing when the document or thing is returned. Within five (5) business days after receiving such notification, the party that made the inadvertent disclosure shall provide to opposing counsel the basis for the claim of privilege or immunity. Within five (5) business days after receiving such a list, and after the parties have attempted to resolve the dispute

through a meaningful meet-and-confer, the party who received the inadvertently disclosed materials or information may file a motion to compel production of such documents and things, the protection of which is still disputed. If such a motion is filed, the party asserting the privilege shall have the burden of proving that the documents and things in dispute are confidential, privileged, or protected by the attorney-client privilege or by work-product immunity. The inadvertent production of these disputed documents will not constitute a waiver of any claim or privilege that may otherwise attach thereto, nor a general waiver of such a claim of privilege.

b. In no event, however, shall the return or destruction of demanded documents be delayed or refused because of a party's objection to the demand or by the filing of a motion to compel. Furthermore, until and unless such motion to compel is granted, that party shall neither quote nor substantively reveal any information contained within the documents or things at issue, either prior to or following their return, except to the extent such information is reflected in an appropriate privilege log.

11. Any documents or information marked "Confidential" or produced in accordance with another protective order in one of the underlying transferred actions, may be used in this MDL and will be treated in accordance with the terms of this Agreement.

12. The termination of this action (or remand of certain actions) shall not relieve any person to whom "Confidential" materials have been provided or disclosed from the obligations of this Order and Agreement, unless the Court so orders or the parties otherwise agree. The parties agree that either may seek leave to reopen this case after final disposition in order to seek enforcement of the provisions of this protective order.

13. No later than 60 days prior to trial, the parties shall confer about the use of

"Confidential" information at trial, and thereafter may raise the issue with the Court as needed.

14. The terms of this Order shall continue unless and until modified and/or terminated by further Order of this Court or by agreement of the parties. Any party may apply to the Court at any time for the modification or exception to this Order.

15. In the event that the Court remands any of the individual matters that have been transferred to this Court back to their original court, the parties in the individual matter(s) remanded back to its original court shall be bound to the provisions of the Order and may retain possession of materials or information designated as "Confidential." The parties may continue utilizing such materials or information, so long as the use of the "Confidential" materials and information is consistent with the provisions of this Order.

16. Once this matter, and/or the individual matters after they have been remanded back to their original court, are ultimately concluded, whether by settlement or by final Order not appealed, all "Confidential" materials shall be promptly destroyed or returned to the producing party within 30 days, except that briefs and other pleadings prepared for use in this litigation need not be returned or destroyed but shall be kept "Confidential." Counsel for each of the parties shall certify, in writing, to opposing counsel that all "Confidential" materials, including all copies and all materials provided to any person pursuant to paragraph 7 herein, have been returned or destroyed.

**IT IS SO ORDERED.**

Dated this 2d day of December, 2010 at Topeka, Kansas.

s/ K. Gary Sebelius  
K. Gary Sebelius  
U.S. Magistrate Judge



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**STATEMENT OF CONFIDENTIALITY**

The undersigned states that he or she has read the Protective Order entered in the case of *In re: Bank of America Wage and Hour Employment Practices Litigation*, MDL No. 2138, pending in the District of Kansas, and agrees that in return for the right to have access to the confidential materials in that case, to comply with the terms of the Protective Order, and submits to the personal jurisdiction of the District Court for the District of Kansas, for the purpose of enforcement of this Protective Order.

This \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

Signature: \_\_\_\_\_

Name Printed: \_\_\_\_\_

**EXHIBIT A**